

E-002/CG-88-491 Order Resolving a Dispute with Northern States  
Power Company

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson  
Cynthia A. Kitlinski  
Norma McKanna  
Patrice M. Vick

Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of  
Rosemount Cogeneration Joint  
Venture, Biosyn Chemical  
Corporation, and Oxbow Power  
Corporation for an Order  
Resolving a Dispute with  
Northern States Power Company

ISSUE DATE: January 7, 1991

DOCKET NO. E-002/CG-88-491

ORDER DENYING PETITION TO AMEND  
PRIOR ORDERS AND ESTABLISHING  
FURTHER PROCEEDINGS ON  
ATTORNEYS' FEES

**PROCEDURAL HISTORY**

On January 3, 1986, Northern States Power (NSP) and Biosyn Chemical Corporation (Biosyn) entered into a Power Purchase Agreement (the Agreement) under which NSP agreed to purchase capacity and energy from Biosyn's proposed Rosemount Cogenerator.

Oxbow, a developer of independent power projects, later formed the Rosemount Cogeneration Joint Venture (the Joint Venture) with Biosyn. The Agreement was then assigned by Biosyn to the Joint Venture.

On July 19, 1988, the Joint Venture, Biosyn and Oxbow filed a petition with the Commission under Minn. Stat. § 216B.164 (1988). The petitioners requested the Commission to resolve contractual disputes between themselves and NSP and to compel NSP to honor the terms of the Agreement. On September 2, 1988, the Commission issued its NOTICE AND ORDER FOR HEARING in the current docket, in which the Commission directed that a contested case hearing be held on the petition.

On May 11, 1989, the Commission issued its ORDER GRANTING PETITION, CONSTRUING CONTRACT, AND REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES. In that Order the Commission determined the following:

1. The Agreement did not require a fluidized bed boiler type facility to be built.
2. The Agreement did not require that commercial operation must commence in 1988 in order for the Joint Venture to receive the contract price.

3. Performance under the Agreement in 1991 would be reasonable.
4. NSP did not act in bad faith following the execution of the contract.

After both parties filed timely petitions for reconsideration, the Commission issued its ORDER AFTER RECONSIDERATION on August 9, 1989. In that Order, the Commission denied both petitions for reconsideration. Neither party appealed this decision.

On June 18, 1990, the Joint Venture filed its Motion for Order Directing Compliance with Previous Order to Pay Costs, Disbursements, and Reasonable Attorneys' Fees. On July 25, 1990, NSP filed its Petition to Amend May 11 and August 9, 1989 Orders.

The Commission met to consider the requests by both parties on December 12, 1990.

### **FINDINGS AND CONCLUSIONS**

#### **NSP's Petition to Amend May 11 and August 9, 1989 Orders**

##### **NSP's Arguments**

NSP argues that the Joint Venture repudiated the Agreement by not proceeding to build the proposed cogenerator. According to NSP, the Joint Venture's failure to act under the terms of the Agreement means that they did not "prevail" under the meaning of Minn. Stat. § 216B.164, subd. 5. Therefore, NSP argues, the Joint Venture is not entitled to an award of attorneys' fees. Under this reasoning, the Joint Venture has forfeited its rights and the Agreement should be null and void.

NSP also argues that there was a mistaken assumption underlying the Commission Order awarding attorneys' fees. NSP contends that the Commission would never have made the attorneys' fee award if it had not believed that the Joint Venture was able to build and operate the facility under the contract terms as construed. Although no definite abandonment of the project has occurred, it appears the Joint Venture has now decided that the project is not economically viable. NSP therefore reasons that the Commission Order was issued under a fatal misconception, and the Order should be rescinded or amended.

##### **The Joint Venture's Arguments**

The Joint Venture argues that it went before the Commission with one request, that the parties' Agreement be declared valid. The Joint Venture argues that the Commission's May 11, 1989 Order

found the Agreement valid and enforceable, and the Joint Venture was therefore the prevailing party under Minn. Stat. § 216B.164, subd. 5. The Joint Venture therefore contends that the Commission should not amend or rescind its Order awarding attorneys' fees to the Joint Venture.

#### Commission Action

Under Minn. Stat. § 216B.25, the Commission has the authority to rescind, alter or amend any Order, and to reopen any case in which an Order has been issued. The Commission will do so, however, only when facts and circumstances sufficiently justify the change to the Order or the reopening of the case. The Commission finds that there are no facts present in this case which justify changing its previous Orders.

While considering NSP's request to amend the prior Orders, the Commission has examined the policy behind Minn. Stat. § 216B.164, subd. 5. This statute was designed to encourage a more "level playing field" between utilities and qualifying facilities, which are usually small independent power producers. The statute reflects a legislative determination that it is in the public interest to encourage such entities as they attempt to negotiate with large utilities. By placing the burden of proof in disputes on the utility, and allowing attorneys' fees to be awarded to the prevailing cogenerator without a finding of bad faith, the legislature shored the strength of cogenerators and small power producers.

In the present instance, the Joint Venture has prevailed within the meaning of Minn. Stat. § 216B.164 subd. 5, and should be entitled to the allowance of attorneys' fees contemplated by the legislature. To do less would be to contradict the intent of the statute.

At the time the parties were before the Commission in 1989, each was asking for an interpretation of the outstanding Agreement. If NSP had prevailed, the Commission would have declared that vital contractual elements (a fluidized bed facility and a 1989 operation for the stated contractual price) had not been fulfilled and the agreement was no longer valid. The Joint Venture prevailed instead when the Commission found that these elements were not required by the contract, which was still valid and enforceable. Based upon the finding that the Joint Venture had prevailed, the Commission awarded attorneys' fees to the Joint Venture.

The Joint Venture was well represented throughout the complex proceeding. It would be contrary to the statute, which was promulgated to allow small power producers to pursue their cases vigorously, to rescind the award of attorneys' fees. Whether or not the cogenerator was able to secure final financing, or

eventually found the project economically viable, the Joint Venture prevailed in its contractual dispute with NSP. The Joint Venture is entitled to its May 11, 1989 award of attorneys' fees; the Commission will not modify or rescind the award.

The Joint Venture's Request for an Order Directing Compliance with Previous Order to Pay Costs, Disbursements and Reasonable Attorneys' Fees

Both parties have stated that if the Commission's previous Orders remain unmodified, a contested case proceeding would not be necessary for the Commission to determine the amount of fees awarded. The Commission, however, finds that there are numerous fact issues regarding which the parties are in disagreement. These issues include, among others:

1. The number of issues or claims determined by the Commission in its May 11, 1989 Order;
2. Whether or not a common core of facts links some or all of the issues decided in the May 11 Order;
3. Whether the hours spent by the Joint Venture's counsel in representation were reasonable in number;
4. Whether any of the hours submitted by the Joint Venture were spent on related litigation and were unnecessary to determination of the dispute before the Commission;
5. A reasonable fee for representation before the Commission, and whether a national or local fee scale should be adopted.

The Commission finds that these and other issues in dispute are material and would best be explored in formal evidentiary proceedings. The Commission will therefore by separate Order refer the matter to the Office of Administrative Hearings for contested case proceedings.

The Commission has given consideration to fashioning a framework for consideration of attorneys' fees by the Office of Administrative Hearings. Limiting the scope of the hearings could expedite the resolution of the matter.

The Commission finds that in this case it is best not to restrict the scope of inquiry of the Administrative Law Judge who will explore the issue of attorneys' fees. Both parties have already incurred high attorneys' fees. Both parties are also aware that a cogenerator who has been awarded attorneys' fees may be awarded further fees charged for representation necessary to recover previous fees. It is therefore in the best interests of both parties to expedite and facilitate the contested case proceeding. It should not be necessary to impose a restrictive framework on

the hearing to gain a fair and speedy proceeding. The Commission will refer the matter to the Office of Administrative Hearings without limitations as to scope.

**ORDER**

1. NSP's Petition to Amend the Commission's May 11 and August 9, 1989 Orders is denied.
2. The Joint Venture's Motion for an Order Directing Compliance with Previous Order to Pay Costs, Disbursements and Reasonable Attorneys' Fees is hereby referred to the Office of Administrative Hearings for contested case proceedings.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster  
Executive Secretary

(S E A L)